

programming. Repeal of the off-network provision of PTAR would thrust the independents into direct competition with network affiliates in bidding for popular off-network programming for broadcast during the 7-8 p.m. time period. That in itself will disadvantage the independents, which are typically much weaker UHF stations than the powerful VHF network affiliates.⁹⁶ But if that economic disadvantage were coupled with the disadvantage which independents will surely suffer if forced to bid against affiliates in acquiring programming from the affiliate's own network, the disadvantage would be insurmountable. To put it bluntly, the double whammy of fin-syn repeal followed by PTAR repeal would be a severe blow that many independent stations just could not survive.

The Commission must seriously consider whether it can responsibly discard PTAR before it even has a chance to assess the market power of the networks following the lifting of the network antitrust consent decrees, the repeal of the fin-syn rules, the realignment and strengthening of network/affiliate relationships, and the upswing in network in-house production. Viacom submits that repeal of PTAR (or its off-network restriction) at this time would so threaten the emerging networks and the independent stations that form the foundation of those networks that repeal would be in derogation of the public interest in diversity and competition in the television industry.

⁹⁶ See pages 12-13 supra.

VI. THE COSTS OF PTAR ARE MINIMAL AND GREATLY OUTWEIGHED BY ITS CONTRIBUTION TO A DIVERSE, COMPETITIVE TELEVISION INDUSTRY.

The benefits of a rule are, of course, only one part of the public interest equation. The Commission must weigh the costs of the rule against those benefits to determine whether repeal would serve the public interest. In the case of PTAR, the costs of the rule are modest and greatly outweighed by the benefits.

Viacom has demonstrated that PTAR will play a vital role in strengthening and expanding UPN's affiliate base and helping UPN's affiliates build an audience for the network's prime time schedule.⁹⁷ The growth of emerging networks like UPN will stimulate new program production, generate new jobs in the television industry, and add to the array of program choices available to the American people.

Moreover, if the history of the Fox network demonstrates anything about the dynamics of new networks and their affiliates, the new networks, if successful, can be expected to boost dramatically the fortunes of its affiliates at such time as the fledgling network has developed to the stage when it is supplying prime time programming at least 5 nights a week. Affiliates of the Fox network experienced a 141% increase in prime time ratings from May 1987, when the Fox network was launched in prime time, to November 1994. The popularity of the Fox network's programming has pulled several Fox UHF affiliates back from the brink of bankruptcy and boosted the economic fortunes of many

⁹⁷ See pages 8-26 supra.

others to the point where they are financially stable stations capable of producing local news and public affairs programming for the first time.⁹⁸ The success of the Fox Network has also fueled substantial growth in local television stations, as many new stations have been built and signed on as Fox affiliates after the initial network launch.⁹⁹ Successful fifth and sixth networks can be expected to spur similar expansion in local television markets.

Thus, by fostering the growth of new networks, PTAR will make a great contribution to all three kinds of diversity historically valued by the Commission: outlet diversity -- the proliferation of additional television stations; source diversity -- increased sources of first-run programming independent of the established networks;¹⁰⁰ and program diversity -- in the form of fresh programming offered by emerging networks, the news, public affairs and other local programming which the strengthened affiliates of a new network can be expected to provide in time, and first-run syndicated programming.

The LECG Report also indicates that strong pro-competitive benefits in the national advertising market will result from the

⁹⁸ See Comments of FBC Television Affiliates in Support of Fox Broadcasting Company's Petition for Resumption of Rulemaking and Request for Temporary Relief, filed March 5, 1990; Comments of FBC Television Affiliates in MM Docket No. 90-162, filed February 1, 1993.

⁹⁹ See Appendix E.

¹⁰⁰ See Comments of King World, Inc. filed today in this proceeding.

emergence of new networks. Network prime time advertising rates steadily increased much faster than the rate of inflation during the decade of the 1980's -- the period of the steepest decline in network ratings.¹⁰¹ Yet since 1990, prime time national advertising rates have declined somewhat.¹⁰² Although this drop is probably attributable in part to the recession, LECG concludes that competition from the emerging Fox Network and from successful first-run syndicators like Viacom and King World who sell time to national advertisers has operated to hold down national prime time advertising rates during the 1990s.¹⁰³ The emergence of fifth and sixth networks will stimulate additional competition in the national prime time advertising market -- and eventually other dayparts as well -- and thus have a beneficial, anti-inflationary effect on advertising rates.¹⁰⁴

Viacom submits that the contributions PTAR has made and will continue to make to diversity and competition in the television marketplace exceed even those anticipated by the Commission when it adopted the rule 25 years ago.

In contrast, there will be no public harm from retaining the rule until such time as the emerging networks are established and

¹⁰¹ See LECG Report, Figure II.2 at 23.

¹⁰² See LECG Report at 27-30.

¹⁰³ See LECG Report at 30. LECG observes that while daytime advertising rates recovered after the recession in normal cyclical fashion, prime time rates continued to drop through 1994. Id.

¹⁰⁴ Id. at 30, 96.

become a meaningful competitive force in prime time. As discussed above, the chief adverse effect of the rule alleged by Disney is that it reduces the profitability of off-network syndication and thus the ability of producers to finance the production of high-quality programs for network television. Yet, as shown above, off-network programs that are highly rated during their network run continue to command high prices in syndication -- in some cases, staggeringly high prices -- and no adverse effect on the production of programming for the networks has been established.¹⁰⁵

Network affiliates have argued that PTAR impairs their programming discretion, depresses their access hour ratings, and impairs their ability to compete with other video distribution outlets, such as cable and independent television stations.¹⁰⁶ Contrary to the affiliates' contention, repeal of PTAR is not necessary to preserve the ability of network affiliates to compete in the marketplace.¹⁰⁷ We have already shown that,

¹⁰⁵ See pages 33-34 supra. As noted above, during the 1994-95 season there are more network situation comedies, which are the type of program that eventually go into off-network syndication, than there were in 1990-91. See Appendix K.

¹⁰⁶ See e.g., Hubbard Broadcasting, Inc. Petition for Rulemaking (MMB File No. 920117A), January 17, 1992. Hubbard Broadcasting argued, for example, that PTAR's off-network provision "is crippling local stations affiliated with a national network in the top-50 markets," impairing affiliates' ability to broadcast the programming most responsive to their viewers' interests, and making it difficult for affiliates to compete with independent stations and cable channels. Id. at 22.

¹⁰⁷ It should be noted that the arguments for repeal of the off-network provision by off-network syndicators like Disney are at odds with those made by the affiliates. Disney has argued

despite increasing cable penetration, network affiliates continue to be the dominant stations in the top-50 markets where PTAR applies.¹⁰⁸ Indeed, the LECG Report demonstrates that the economic gap between network affiliates and independent stations has widened substantially despite the growth of cable, refuting the contention that cable has weakened network affiliates and strengthened their independent station competitors.¹⁰⁹

We have also shown that the effect of repealing PTAR or its off-network restriction will be displacement of first-run programming on network affiliates' schedules and the loss of popular off-network series by the independents. While the effect of the loss of off-network hits aired during the access hour will be disastrous economically for marginally profitable independent stations,¹¹⁰ the marginal increase in profits for already dominant affiliates will only further entrench their dominant position. Thus, there are no public interest benefits of repeal; it would simply strengthen already strong competitors at the expense of weaker competitors, ultimately diminish competition at the local level and, by stymieing efforts to establish new networks, diminish competition at the national level as well.

that the affiliates will continue to broadcast first-run programming during access, while it is apparent from the affiliates' filings that they have other plans in mind.

¹⁰⁸ See pages 12-13 supra.

¹⁰⁹ See LECG Report at 31-41.

¹¹⁰ See pages 16-19 supra.

Nor does PTAR result, as the affiliates have suggested, in a loss of programming desired by viewers. If the off-network portion of the rule were repealed, network affiliates in the fifty largest markets would be able to broadcast off-network reruns during, at most, one more hour of prime time -- or thirty minutes, for those affiliates that broadcast network news during half of the access hour. Those programs would undoubtedly be programs that are now broadcast by independents during the access hour.¹¹¹ This shifting of programs from one outlet to another would not add to the diversity of programs available to the public. Indeed, it would result in lower overall ratings for access hour programming; popular first-run programs would be displaced by off-network hits on affiliates' schedules and independents would be forced to substitute lower-rated off-network series for the more popular off-network series that they lose to the affiliates. Furthermore, there would be a net loss of programming from independent production sources since many new first-run programs would not get produced.¹¹²

The Commission has often stated that its public interest mandate requires it not to maximize private parties' profits, but rather to "ensure that the market as a whole functions competitively, which will maximize the overall diversity of

¹¹¹ See LECG Report at 81-85.

¹¹² See Comments of King World, Inc. filed today in this proceeding.

program sources and result in the best service to the public."¹¹³ PTAR's contributions to fostering the growth of independent stations, competition in local markets, the growth of additional broadcast networks, and a robust national programming market easily outweigh its modest limitation on the programming discretion of affiliates in the largest markets and marginal decrease in the profitability of a few off-network producers and syndicators -- who seem to be doing quite well with PTAR in effect. And it is those contributions to diversity and competition which should be the focus of the Commission's public interest analysis.

VII. PTAR IS CONSISTENT WITH THE FIRST AMENDMENT AND FURTHERS FIRST AMENDMENT GOALS.

First Media Corporation and others have challenged the constitutionality of PTAR under the First Amendment,¹¹⁴ and the Commission requests comment on whether the previous constitutional justifications for PTAR still apply.¹¹⁵ In the wake of the Supreme Court's recent decision in Turner Broadcasting System, Inc. v. FCC,¹¹⁶ no serious First Amendment challenge can be leveled against PTAR.

¹¹³ Fin-Syn Reconsideration Order at 8289 n.52.

¹¹⁴ See, e.g., Petition for Declaratory Ruling filed by First Media Corporation, April 18, 1990.

¹¹⁵ See NPRM at 6362.

¹¹⁶ ____ U.S. ____, 114 S.Ct. 2445 (1994) ("Turner Broadcasting").

In Mt. Mansfield Television Inc. v. FCC,¹¹⁷ the Second Circuit specifically upheld PTAR's constitutionality under the First Amendment, applying the less rigorous standard for broadcast regulation established by the Supreme Court in Red Lion Broadcasting Co. v. FCC,¹¹⁸:

[T]he prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "[o]nly three organizations control access to the crucial prime time evening television schedule."¹¹⁹

The Seventh Circuit recently upheld the constitutionality of the fin-syn rules under the same standard in Schurz Communications, Inc. v FCC.¹²⁰

Developments during the years since Mt. Mansfield have not undermined the constitutionality of PTAR. First Media has argued that the "scarcity" rationale that has been the Supreme Court's justification for applying a less rigorous test of constitutionality to broadcast regulation is no longer viable in light of the proliferation of new media. However, the Supreme

¹¹⁷ 442 F.2d 470 (2d Cir. 1971) ("Mt. Mansfield") (footnote omitted). See also National Ass'n of Indep. Television Producers & Distribut. v. FCC, 516 F.2d 526, 536-37 (2d Cir. 1975) (affirming 1975 revisions of PTAR on First Amendment and other grounds).

¹¹⁸ 395 U.S. 367, 386 (1969).

¹¹⁹ Mt. Mansfield, 442 F.2d at 477.

¹²⁰ 982 F.2d 1043, 1049 (7th Cir. 1992).

Court has applied or endorsed that standard three times during the last ten years.¹²¹ Moreover, the factual underpinning of that standard remains true today: finite electromagnetic frequencies require the government to license broadcast stations, limit the number of broadcast licensees (thereby excluding certain applicants), and thus permit the government to enact laws and regulations designed to open up the medium to diverse views and program sources.¹²²

It is not really necessary, however, to debate the continuing vitality of the scarcity doctrine in order to put to rest any questions about the constitutionality of PTAR, for that rule would unquestionably be upheld under the O'Brien test applicable to nonbroadcast regulations. "Content-neutral" regulations that confer benefits or impose burdens on speech without reference to the views expressed are subject to an "intermediate" level of First Amendment scrutiny. The Supreme Court made it clear in Turner Broadcasting that regulations that "distinguish between speakers in the television programming market . . . based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry" are considered content-neutral under the O'Brien test

¹²¹ See FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990); Turner Broadcasting, *supra*.

¹²² See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 810 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-89 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

as long as they are not "a subtle means of exercising content preference."¹²³ Thus, the Supreme Court upheld the must-carry rules because they required that cable operators set aside channels for carriage of broadcast stations based on the operator's channel capacity rather than the programming of the broadcast station, and the rules benefitted all full power television stations that requested carriage regardless of the content of their programming. Id. at 2465. Furthermore, the Court concluded that the purpose of the rules was to preserve access to broadcast television programming rather than to regulate on the basis of content. Id. at 2462-63.

Like the must-carry provisions, PTAR neither distributes burdens and benefits based on the content of speech nor compels stations to distribute programming bearing particular messages. Rather, it prohibits network affiliates in the 50 largest markets from carrying network or off-network programming during, at most, one hour of prime time regardless of the content of that programming.¹²⁴ Furthermore, the Commission's purpose in

¹²³ Turner Broadcasting, 1145 S. Ct. at 2460.

¹²⁴ Although certain types of programming, such as news and children's programming, are exempt from PTAR, these exemptions simply give network affiliates who elect to utilize them greater programming latitude than they would have without such exemptions. Thus, it cannot seriously be maintained that the exemptions create a First Amendment infirmity that would not exist in their absence. In any event, PTAR only exempts certain categories of programming, whatever their content; the rule does not create a danger of governmental favoritism of programming bearing particular messages. Indeed, the Second Circuit specifically affirmed the constitutionality of the PTAR exemptions, reasoning: "The Commission by this amendment of the rule is not ordering any program or even any type of program to

imposing this limitation was not to advance particular views but rather to promote greater diversity of views by a greater number of speakers. Thus, PTAR would clearly be considered a "content-neutral" regulation under the Court's reasoning in Turner Broadcasting.

A regulation will survive intermediate scrutiny under the First Amendment if (1) it furthers an important or substantial governmental interest; (2) that interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest.¹²⁵ PTAR clearly satisfies this standard.

First, the government's interest in promoting a diversity of program sources, competition in the program market, the growth of independent stations and the development of new broadcast networks are unquestionably substantial. Indeed, the Supreme Court recently specifically held in Turner Broadcasting that:

[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. . . . [Also], the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations

be broadcast in access time. It has simply lifted a restriction on network programs if the licensee chooses to avail himself of such network programs in specified categories of programming." National Ass'n of Indep. Television Producers & Distrib., 516 F.2d 526, 537 (2d Cir. 1975).

¹²⁵ United States v. O'Brien, 391 U.S. 367, 377 (1968).

are engaged in expressive activity protected by the First Amendment.¹²⁶

As discussed above, there is ample evidence that PTAR in fact advances those goals.¹²⁷

Second, these governmental interests are unrelated to the suppression of free expression. As discussed above, the Commission seeks to foster, not suppress, free expression by promoting the development of a vibrant first-run production industry, strengthening independent stations, and fostering the development of additional broadcast networks. Thus, PTAR is designed to advance First Amendment goals.

Finally, PTAR is narrowly tailored to advance the Commission's goals without burdening "substantially more speech than is necessary to further the government's legitimate interests. . . ." ¹²⁸ There is ample support for the Commission's conclusion that first-run syndicators need access to at least one hour of prime time on the schedules of network affiliates in the largest markets in order to launch their program offerings.¹²⁹ Similarly, there is abundant support for its conclusion that ready access to off-network programs for airing during the access hour is crucial to the viability of independent stations and that

¹²⁶ Turner Broadcasting, 114 S. Ct. at 2470.

¹²⁷ See Section III supra.

¹²⁸ Turner Broadcasting, 114 S. Ct. at 2469, quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1988).

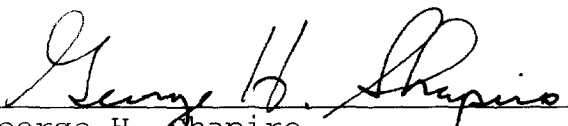
¹²⁹ See Comments of King World Productions, Inc. filed today in this proceeding.

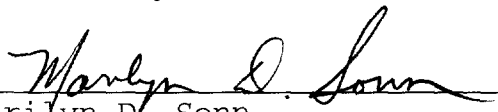
PTAR plays an important role in assuring such access.¹³⁰ And no one can deny that a core of solid independent stations, including stations in major markets, is a *sine qua non* for the establishment of new broadcast networks.¹³¹ Furthermore, PTAR is a modest, targeted measure that is designed to achieve the Commission's objectives while intruding minimally -- at most, one hour per day -- into the programming prerogatives of network affiliates in the fifty largest markets.

In short, there are no constitutional impediments to retaining PTAR in its present form.

CONCLUSION

For the foregoing reasons, Viacom Inc. urges the Commission to retain the prime time access rule.


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March 7, 1995

¹³⁰ See pages 15-19 supra.

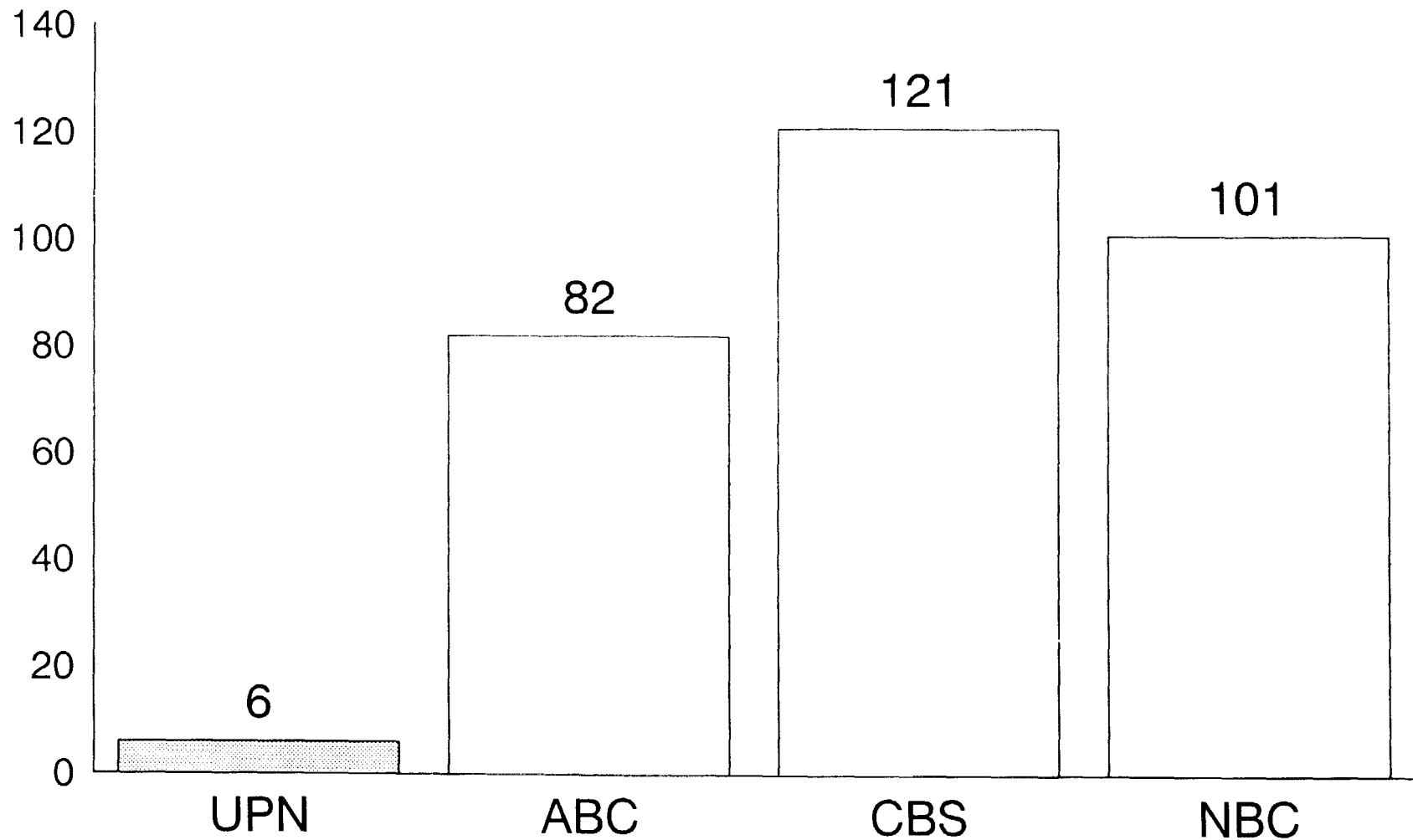
¹³¹ See pages 8-14 supra.

APPENDIX A

Hours of Network Programming

Network Programming vs. UPN

Total # of Hours Per Week*



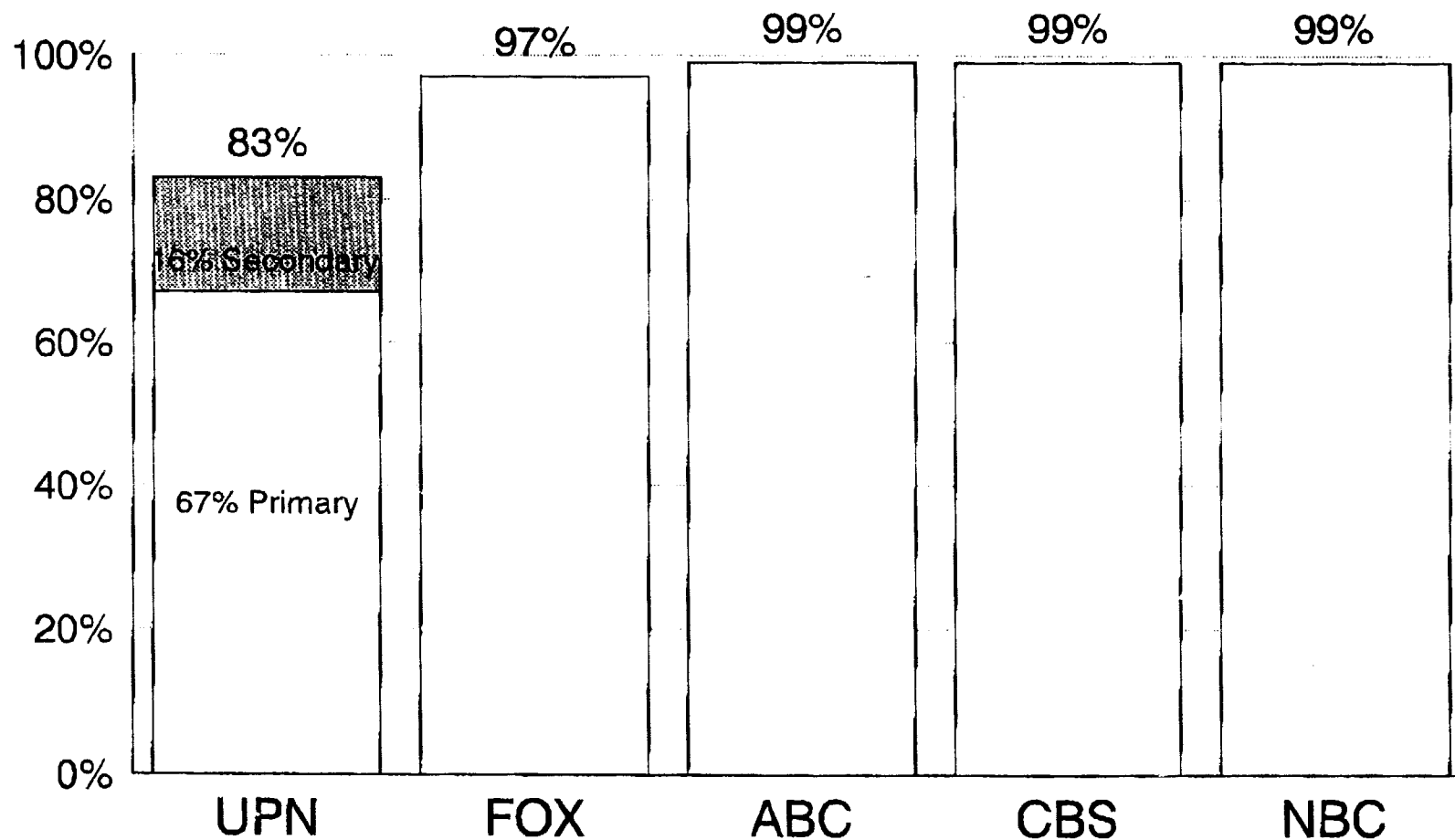
Source: NSI, November 1994 averages (UPN January 1995). *Includes sports programming which may vary in length from week-to-week / season-to-season.

APPENDIX B

Network Coverage

% Coverage of U.S. Television Households

UPN vs. ABC, CBS, NBC, FOX



Source: NTI, 1995.

APPENDIX C

UPN Launch vs. Fox Launch

UPN
VERSUS
FOX LAUNCH

	<u>FBC</u> <u>APRIL 1987</u>	<u>UPN</u> <u>PRIMARY</u> <u>AFFILS</u> <u>JAN 1995</u>	<u>ALL</u> <u>UPN</u> <u>JAN 1995</u>
TOTAL # STATIONS	106	68	112
TOTAL % U.S.	83.4%	66.76%	82.5%
VHF STATIONS	16	9	19
% U.S.	24.76%	16.52%	20.90%
UHF STATIONS	90	59	93
% U.S.	59.08%	50.24%	61.60%

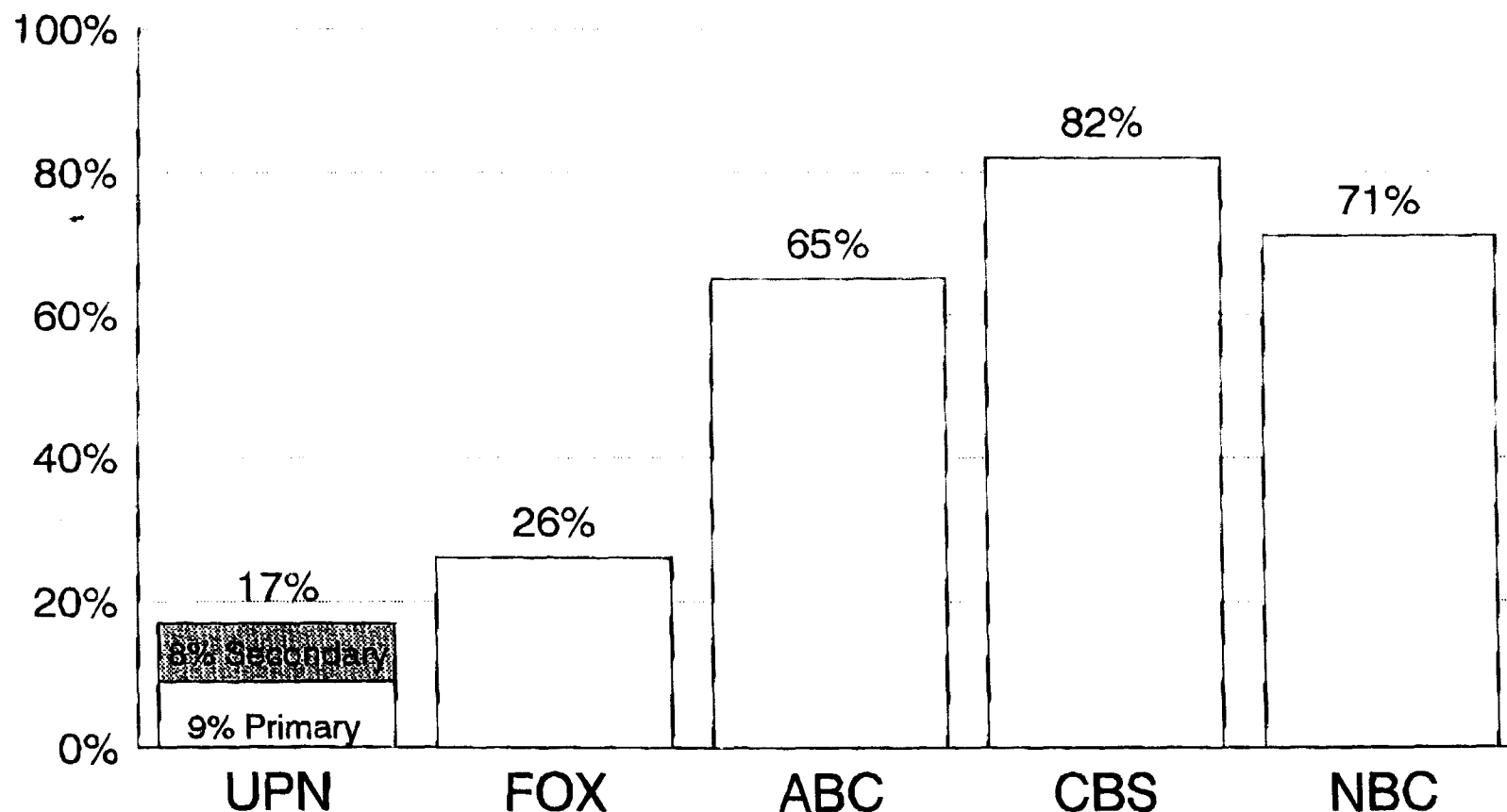
APPENDIX D

Network Affiliates

Fall 1995 Projected

% of Total Affiliates that are VHF Stations

UPN vs. ABC, CBS, NBC, FOX

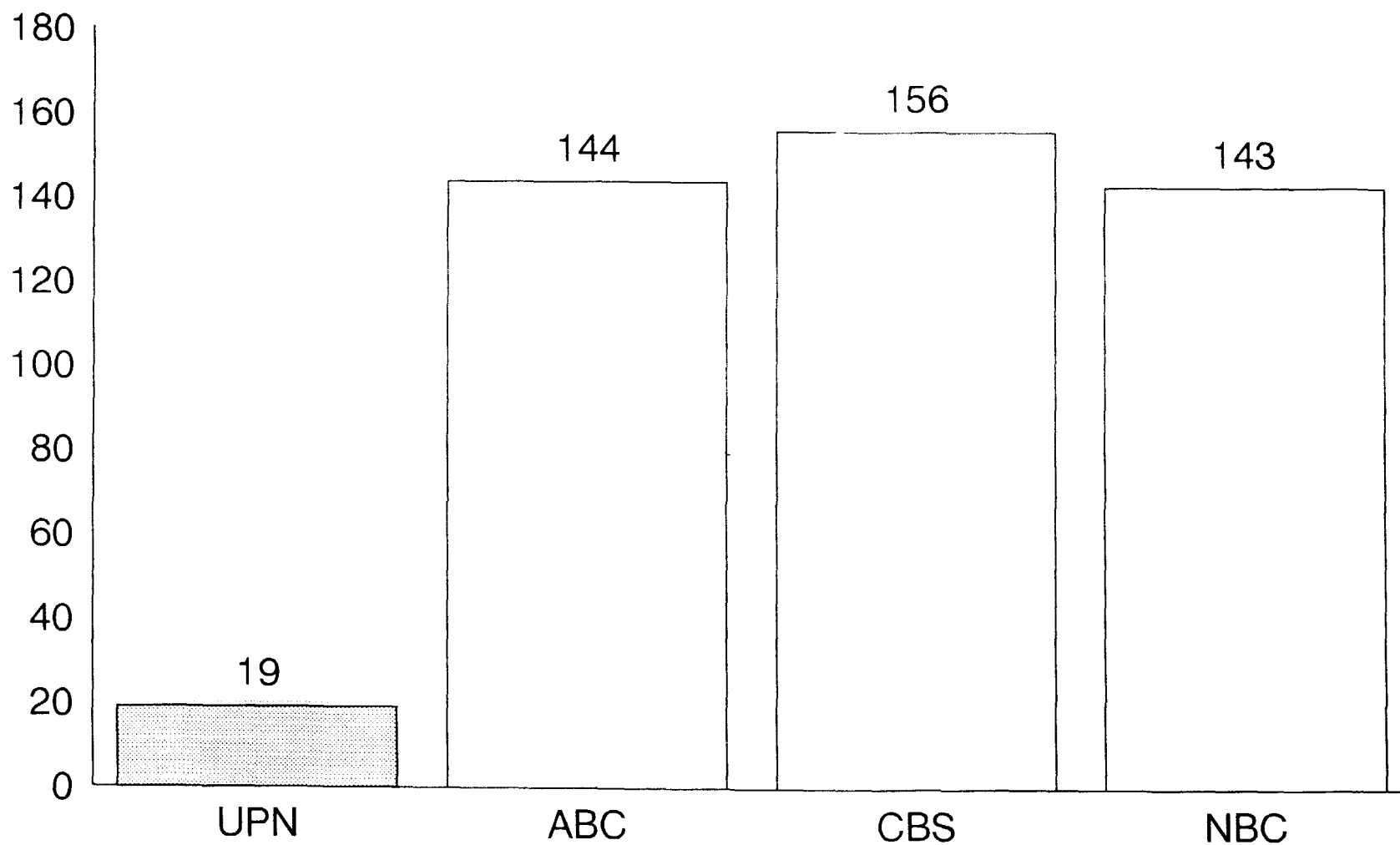


Source: Petry Rep firm memo.

of VHF Affiliates

UPN vs. ABC, CBS, NBC

November 1994



Source: NSI, November 1994.

APPENDIX E

New Stations That Have Signed On As Fox Affiliates After Network Launch

NEW NETWORK SUCCESS
TRANSLATES INTO
NEW GROWTH OF LOCAL
TV STATIONS

The successful launch of the Fox Network has translated into a brand identity for local stations across the U.S. This branding has allowed a significant number of new stations to sign-on as Fox affiliates.

NEW FOX AFFILIATION
SIGN-ON (POST-LAUNCH)

<u>RANK</u>	<u>MARKET</u>	<u>STATION</u>
66	ROANOKE	WFXR
67	SYRACUSE	WSYT
83	CEDAR RAPIDS	KOCR
86	MADISON	WMSN
89	COLUMBIA	WACH
91	JOHNSTOWN	WWCP
96	BATON ROUGE	WGMB
98	WACO	KWKT
99	SPRINGFIELD	WTIC
106	GREENVILLE	WFXI
107	SIOUX FALLS	KTTW
112	AUGUSTA	WFXG
116	TALLAHASSEE	WTLH
117	EUGENE	KLSR
118	FT. SMITH	KPBI
121	TRAVERSE CITY	WGKI
123	YAKIMA	KCY
126	CHICO	KCVU
127	FLORENCE	WCC
129	CORPUS CHRISTI	KDF
152	ODESSA	KPEJ
158	ABILENE	KDT
162	DOTHAN	WDAU
164	UTICA	WFXV
168	HATTIESBURG	WXXV
169	PANAMA CITY	WPGX
194	LAFAYETTE	WXIN
197	ANNISTON	WNAL
202	BEND	KPDX
205	FAIRBANKS	KUU

Future growth of the new United Paramount Network can only come if new stations sign-on as affiliates.